



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 29, 2003

Mr. Brad Norton
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City of Austin
P.O. Box 1546
Austin, Texas 78767-1546

OR2003-9327

Dear Mr. Norton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 193269.

The City of Austin (the "city") received a request for discipline records found in five named officers' Civil Service Commission's files, a list of lawsuits filed against five named officers and the Austin Police Department during the past 15 years, discipline records found in the Civil Service Commission file of each officer assigned to the 6th Street walking beat, incident reports from arrests or incidents in the downtown entertainment area on 6th Street during the past year, and the training record of each officer assigned to the 6th Street walking beat. You claim that the requested information is excepted from disclosure under sections 552.101, 552.108, 552.117, and 552.1175 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information, some of which consists of representative samples.²

Initially, we note that you have only submitted offense reports to this office for review. As you have not submitted any other responsive information for our review, we assume you have released this information to the extent that it exists. If you have not released any such

¹Although you have labeled some of the documents with section 552.103 of the Government Code, you have not submitted written arguments stating how this exception applies to the submitted information. Therefore, we find that you have waived this exception. See Gov't Code §§ 552.301, .302.

²We assume that the sample of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

records, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes, such as section 143.089(g) of the Local Government Code. Section 143.089 of the Local Government Code provides in pertinent part:

(a) The director [of the fire fighters' or police officers' civil service] or the director's designee shall maintain a personnel file on each fire fighter and police officer. The personnel file must contain any letter, memorandum, or document relating to:

...

(2) any misconduct by the fire fighter or police officer if the letter, memorandum, or document is from the employing department and if the misconduct resulted in disciplinary action by the employing department in accordance with this chapter . . .

...

(g) A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer. The department shall refer to the director or the director's designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file.

We understand that the city is a civil service city under chapter 143 of the Local Government Code. Thus, section 143.089 of the Local Government Code provides for the creation of two personnel files for police officers and fire fighters: one that must be maintained by the city's civil service director or his designee and another that may be maintained by the city's fire and police departments. Local Gov't Code § 143.089(a), (g). In cases in which a police department investigates a police officer's misconduct and takes disciplinary action against an officer, it is required by section 143.089(a)(2) to place all investigatory records relating to the investigation and disciplinary action, including background documents such as complaints, witness statements, and documents of like nature from individuals who were not in a supervisory capacity, in the police officer's civil service file maintained under section 143.089(a). *Abbott v. City of Corpus Christi*, 109 S.W.3d 113, 122 (Tex. App.—Austin 2003, no pet.). All investigatory materials in a case resulting in disciplinary action are "from the employing department" when they are held by or in possession of the department because of its investigation into a police officer's misconduct, and the department

must forward them to the civil service commission for placement in the civil service personnel file. *Id.* Such records are subject to release under chapter 552 of the Government Code. *See* Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990). However, information maintained in a police department's internal file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. Texas Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.-Austin 1993, writ denied).³

You state that "[t]he requested information is related to the officer's employment relationship with the police department and is excepted from disclosure by Section 143.089(g) of the Local Government Code because it is information contained in the departmental personnel file of a police officer." We note, however, that the requestor is not specifically seeking only information from the police department's internal personnel files. In one portion of his request, the requestor simply asks for incident reports the officers filed when they arrested or documented an incident in the downtown entertainment area on 6th Street during the past year. Furthermore, while we generally agree that the police department's internal affairs investigations that do not result in disciplinary action are confidential under section 143.089(g), we note that the incident reports are also maintained separate and apart from the internal affairs investigation. The confidentiality afforded by section 143.089 may not be engrafted on other records that exist independently of an internal affairs investigation. *See City of San Antonio v. San Antonio Express-News*, 47 S.W.3d at 564-65 (providing that only information that reasonably relates to fire fighter's or police officer's employment relationship with department is confidential under section 143.089(g)). Thus, to the extent the city maintains the submitted incident reports solely in the police department's internal personnel files concerning the involved police officers, those incident reports are confidential under section 143.089(g) and must be withheld under section 552.101. However, copies of the incident reports that are maintained outside of these officers' department personnel files for other law-enforcement related purposes are not confidential under section 143.089(g) and may not be withheld on that basis.

We now address your remaining arguments for the submitted incident reports maintained outside of the police department's internal personnel files. Section 552.101 of the Government Code also encompasses section 58.007 of the Family Code. Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential under section 58.007. The relevant language of section 58.007(c) reads as follows:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

³We note that section 143.089(g) requires a police department that receives a request for information maintained in a file under section 143.089(g) to refer that person to the civil service director or the director's designee. You state that you have done so.

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

Incident reports 2003-920071793 and 2002-923280134 involve juvenile conduct that occurred after September 1, 1997. It does not appear that any of the exceptions in section 58.007 apply; therefore, these reports are confidential pursuant to section 58.007(c) of the Family Code. The city must therefore withhold incident reports 2003-920071793 and 2002-923280134 from disclosure under section 552.101 of the Government Code as information made confidential by law.

Next, section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common law privacy: an individual's criminal history when compiled by a governmental body, *see* Open Records Decision No. 565 (citing *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)), personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). After reviewing the submitted information, we find that it contains such highly intimate or embarrassing facts that are of no legitimate concern to the public, and thus conclude this information, which we have marked, is protected by common-law privacy and therefore must be withheld under section 552.101 of the Government Code.

We also note that some social security numbers within the submitted documents may be confidential under federal law. Section 552.101 also encompasses amendments to the Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), that make confidential social security

numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). We have no basis for concluding that the social security numbers at issue are confidential under section 405(c)(2)(C)(viii)(I) and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that such information is not obtained or maintained by the city pursuant to any provision of law, enacted on or after October 1, 1990.

Next, you argue that some of the submitted incident reports are excepted from disclosure under section 552.108(a)(1) and (2) of the Government Code. Section 552.108(a) provides as follows:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

(1) release of the information would interfere with the detection, investigation or prosecution of crime; [or]

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(a)(1)-(2). Generally, a governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). On the other hand, a governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See* Gov't Code §§ 552.108(a)(2), .301(e)(1)(A).

You assert that incident reports 2003-2451610 and 2003-2850229 relate to pending criminal cases. Based upon this representation, we conclude that the release of these incident reports would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Therefore, we conclude that section 552.108(a)(1) is applicable to incident reports 2003-2451610 and 2003-2850229. You further state incident reports 2003-926000084 and 2003-921022081 pertain to cases that concluded in a result other than conviction or deferred adjudication. Therefore, we agree that section 552.108(a)(2) is applicable to these records. We further note that although you appear to indicate that other submitted incident reports are excepted under section 552.108, you do not indicate whether the other reports relate to open or closed investigations or

otherwise explain how section 552.108 applies. Therefore, we conclude you have not met your burden in establishing the applicability of section 552.108 to any of the other submitted incident reports.

We note, however, that basic information normally found on the front page of an offense report is generally considered public. *See generally* Gov't Code § 552.108(c); *Houston Chronicle*, 531 S.W.2d 177; Open Records Decision No. 127 (1976). Thus, you must release the types of information that are considered to be basic front page offense report information, even if this information is not actually located on the front page of the offense report. Although section 552.108 authorizes you to withhold the remainder of incident reports 2003-2451610, 2003-2850229, 2003-926000084, and 2003-921022081 from disclosure, you may choose to release all or part of these reports that is not otherwise confidential by law. *See* Gov't Code § 552.007.

Next, you assert that some of the submitted information is excepted from disclosure under sections 552.117 and 552.1175 of the Government Code. Section 552.117(a)(2) excepts from disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of a peace officer, as that term is defined by article 2.12 of the Code of Criminal Procedure, regardless of whether the officer requests confidentiality for that information under section 552.024 or 552.1175 of the Government Code. Section 552.1175 also applies to information that relates to peace officers, as defined by article 2.12 of the Code of Criminal Procedure, and provides in part:

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(b). In this instance, however, the submitted information does not contain any information protected by section 552.117 or 552.1175. Accordingly, the city may not withhold any information under section 552.117 or 552.1175.

Finally, we note that some of the submitted information is excepted under section 552.130 of the Government Code. Section 552.130(a) excepts from disclosure information that relates to: "(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; (2) a motor vehicle title or registration issued by an agency of this state; or (3) a personal identification document issued by an agency of this state or a local agency

authorized to issue an identification document.” Gov’t Code § 552.130(a)(1)-(3). Thus, the city must withhold the information we have marked pursuant to section 552.130.

In summary, we conclude that to the extent the city maintains the submitted incident reports solely in the police department’s internal personnel files concerning the involved police officers, the incident reports are confidential under section 143.089(g) and must be withheld under section 552.101. Otherwise, we conclude the following with respect to the submitted information: (1) city must withhold incident reports 2003-920071793 and 2002-923280134 from disclosure under section 552.101 in conjunction with section 58.007 of the Family Code, (2) the city must withhold the information we have marked under section 552.101 in conjunction with common-law privacy; (3) social security numbers may be confidential under federal law, (4) except for basic information, which must be released, the city may withhold incident reports 2003-2451610 and 2003-2850229 under section 552.108(a)(1), and incident reports 2003-926000084 and 2003-921022081 under section 552.108(a)(2), and (6) the city must withhold the information we have marked under section 552.130 of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body’s intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general’s Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/sdk

Ref: ID# 193269

Enc. Submitted documents

c: Mr. Christopher Keating
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(w/o enclosures)